United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2107

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JULIUS F. KLEIN, Petitioner-Appellant, -against- HAROLD SMITH, as Superintendent of the Attica Correctional Facility, Attica, New York, Respondent-Appellee.	NO. 76-2107

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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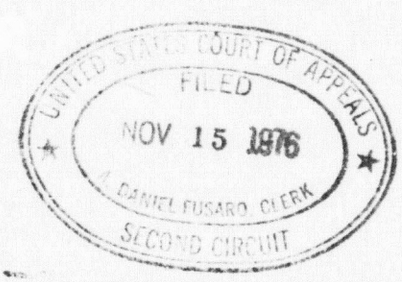

LAWRENCE W. KESSLER
Attorney for Appellant
Hofstra Law School
Hempstead, New York 11550

516-560-3216

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Questions Presented

1) Once appellant proved intentional intrusion by an agent of the prosecutor into the lawyer-client relation, was the District Court correct in requiring petitioner to prove that the agent transmitted prejudicial information when proof of transmittal necessitates that the prosecutor admit to committing a criminal act?

2) Was the District Court correct in permitting an essential witness to refuse to testify pursuant to a claimed

Fifth Amendment privilege?

3) Was the District Court correct in preventing the petitioner from presenting the testimony of witnesses who had reasons to know relevant and admissible information?

4) Was the District Court correct in refusing to permit the petitioner to attend and participate in the reopened habeas corpus hearing?

Statement Purusant to Rule 28(a)

This is an appeal from orders of the United States District Court for the Southern District of New York (Owen, J.) dated October 15, 1974, denying petitioner's application for a writ of habeas corpus after an evidentiary hearing, and July 20, 1976, reaffirming the order of October 15, 1974 after a reopened evidentiary hearing.

History of the Case

On February 20, 1969 William Reuther was indicted by a Suffolk County grand jury for murder in the First Degree for the September 28, 1966 killing of Irene Brandt. Mr. Reuther retained Mr. Edward Bobick, Esquire to represent him. Without informing Mr. Bobick, William Reuther then testified

before the Grand Jury, and petitioner-appellant Julius F. Klein was thereafter indicted on March 22, 1969 for murder in the First Degree arising out of the same killing.

Appellant Klein also engaged Mr. Bobick, who represented both defendants until three weeks before appellant's trial.

Purusant to appellant's motion, venue was transferred to the County of Westchester and, and appellant was tried before the Honorable P. Raymond Sirignano, in the Supreme Court, Westchester County from October 15, 1967 to October 31, 1969, at which time appellant was found quilty as charged. Appellant was sentenced to life imprisonment on March 23, 1970.

An appeal was taken to the Appellate Division of the State of New York, Second Department. The conviction was affirmed, without opinion, on December 20, 1971. Permission to appeal to the Court of Appeals of the State of New York was granted on January 25, 1972, by the Honorable Charles C. Breitel, but on February 14, 1973, the Court of Appeals affirmed without opinion.

On October 9, 1973, appellant filed a writ of habeas corpus. A hearing was granted by Judge Ward on December 12, 1973. The hearing was held before Judge Owen on March 25, 26, April 1 and 9, 1974, and the writ was denied by Judge Owen on October 15, 1974.

A Notice of Appeal was filed in the Court of Appeals for the Second Circuit, but the matter was returned to the

District Court for determination of a motion pursuant to Federal Rules of Civil Procedure 60 to reopen the evidentiary hearing because of newly discovered evidence. Judge Owen granted that motion on April 29, 1976, and the hearing was held on May 27, June 18, July 13 and 20, 1976. On July 20, 1976, Judge Owen reaffirmed his denial of the writ.

Facts

On September 28, 1966, Irene Brandt was murdered. Appellant was indicted for that crime on March 22, 1967. (Transcript of the 1974 hearing at p. 173--hereinafter designated a T.___). At that time, he was in custody in the Clinton Correctional Facility, Dannemora, New York. One month prior to his indictment, William Reuther had been indicted for commission of the same crime (T.173). Immediately thereafter, and until appellant's trial, William Reuther was housed in the Suffolk County Jail, Riverhead, New York. (T.1--- .

Reuther engaged the law firm of Bobick and Deutsch to represent him. They appeared at the arraignment (T.17--5). Within three weeks of retaining this firm, he lost confidence in their interest in representing him. He therefore began cooperating with the Suffolk prosecutor in charge of this case -- Maurice Nadjari (T.174-5). He agreed to cooperate

in exchange for a promise that he would be allowed to plead guilty to the crime of manslaughter for which he would receive a sentence of no more than two to four years imprisonment for his role in the crime. (T.176-7).

At this time both Reuther and Nadjari were aware of the fact that Bobick and Deutsch represented appellant. Nadjari was also cognizant of the fact that the dual representation of Reuther and appellant would inevitably create a conflict that could not be permitted (T.184). But he in no way warned Reuther not to confer with Bobick and Deutsch about their representational plans for both clients, nor warned Reuther not to reveal defense plans to himself or his agents.

From prior to the indictment of appellant to the time of the trial, Reuther conferred frequently with Nadjari and other members of the district attorney's and police departments (T. 31,33,179). During the same period of time, his attorneys came to see him in Suffolk, travelling 100 miles from their New York City Officers, on at least nine occasions (T. 10-12, T. 133). On one day he saw his attorneys in the morning, and representatives of the prosecutor's office in the afternoon (T.13).

The exact matters discussed in these meetings, other than in those directly with Nadjari, is not truly known

because appellant was prevented from calling the then District Attorney of Nassau County -- George Aspland -- as a witness.

The topic of conversation between Reuther and his lawyers is the subject of dispute. Reuther testified that he never discussed the murder case with his attorneys (T. 98), and that he therefore knew nothing about defense strategies. Mr. Deutsch and Mr. Bobick both testified that they fully discussed the case with their client. Indeed, that was their reason for going all theway to the Suffolk Jail (T.134, 139). Of course, Nadjari argued that Reuther never talked to him about defense plans.

During the months that Reuther was meeting with both prosecution and defense, appellant's attorneys were never informed of the dual role of Reuther as client and cooperator (T.183). In fact, to conceal his cooperator status, the prosecution filed an evasive affidavit. This affidvait alleged that no statements taken from a client of Bobick and Deutsch -- either defendant -- would be used as evidence by the prosecution (T.43). Of course, literally this statement was true in that the intent was not to use the statement that Reuther had given, but rather his testimony (T.188).

During the same months in which Reuther was meeting with prosecuting and defense attorneys, another man connected

to the prosecutor's office was also meeting with appellant's lawyer. This man was William O'Gorman. He was a co-defendant with Reuther on a then pending felony charge in Suffolk County (T.200, 282). Throughout 1969, he was acting as an informant for the Suffolk Police Department (T.303). His contact was a captain John Gallagher. As an informer, O'Gorman gave information about privileged communications of Edward Bobick to clients (T.311). Gallagher remembered the details of one such report, but had a failure of memory as to whether there were others (T.312). O'Gorman also gave information about appellant's murder case (T.305). But knowing that O'Gorman was in contact with Bobick, he in no way informed O'Gorman to stop intruding on privileged communications or to abstain from reporting them to the police.

In fact, the testimony shows that O'Gorman was permitted to act as the "friend" of appellant's defense. He accompanied potential witnesses to Bobick's office and chauffered Bobick to witnesses' homes (T.156). O' Gorman was simultaneously visiting Reuther in jail (T.94). In one of these visits he supposedly communicated a threat to Reuther (T.117). This threat was part of the reason that Reuther asked Nadjari to permit him to be represented by appellant's lawyer until three weeks before the trial (T.175,181). In some way the words of the informant O'Gorman created such

fear that appellant would, from his cell in Dannemora, injure Reuther in his cell in Suffolk, that Nadajari felt compelled to acquiesce to the wishes of William Reuther (T.124, [illegible]).

In 1970 -- after appellant was acquitted of another felony charge, the Suffolk prosecutor moved to dismiss the felony charge against his two Klein informers -- Reuther and O'Gorman (T.194-9). One of the reasons for that requested dismissal was the cooperation of the defendants. Reuther had testified that the only promise he received for his agreement to testify against appellant in the murder trial was a two to four year sentence (T.194-9).

When O'Gorman was called to testify at the 1976 habeas hearing before Judge Owen he refused to testify. That refusal was based upon his Fifth Amendment privilege (Transcript, June 18, 1976, p.24 , hereinafter cited as T.[illegible] p.[illegible]). He would not respond to any questions about information he obtained from appellant's attorneys or about information he transmitted to the prosecution. He was allowed to remain silent although he took no action regarding appellant after May of 1970 -- a period of more than six years prior to the hearing.

But evidence was adduced as to his activities during

the crucial pre-trial period.

While Reuther was incarcerated in the Suffolk Jail, another inmate was Charles Lucchetti. He testifed that he had agreed to testify for appellant at his trial. He withdrew this offer when he was told by Reuther and O'Gorman that to testify would expose him to the risk of being co-defendant in another pending felony case (T.225-30). Reuther denied making the threat, but agreed that he had talked with Lucchetti at the jail (T.241). Lucchetti did, in fact, refuse to testify for appellant (T.233).

Despite the barrier created by his refusal to testify, the record reveals other actions of the informant O'Gorman.

In March, 1969, Owen Osterman came to Bobick's office with Mrs. Klein (appellant's wife) and O'Gorman. This meeting was held after Reuther's but before appellant's indictment (T.273).

They met to discuss his possible defense if indicted. In their possession was a letter written by appellant that outlined his suggestions for a defense, including witnesses and possible testimony (T.272-5). O'Gorman took that letter and did not return it (T.276).

Support for this fact comes from a document written by O'Gorman. It was subpoened from the custody of the Suffolk District Attorney's Office (Transcript July 20, 1976, p. 76-7, hereinafter cited as T. J. 20 p. ___). O'Gorman wrote this letter to his friend, Marty Silvestri. Silvestri testified that the letter was read to him over the telephone (Transcript May 27, 1976, p. 17, hereinafter cited as T. M. 27, p.___; T.J. 20 p.106). The letter was admitted into evidence (T.J. 20 p.130). In pertinent parts it says:

"Marty: 12/23/75

...

As you know my life has been threatened and I have a tape of one conversation. I have reported the threat to Hoey's office (on tape) more than once and they have done nothing. ...I guess it would save everyone a lot of trouble if I were out of the way.

To start with I would like to state that Julie Klein was framed for the murder of Irene Brandt! Bill Reuther lied through his teeth at the instruction of the D.A.'s office to hang Klein. I was present at the D. A.'s office, etc. (mock trials) and also was bringing back information from

Klein's lawyer Bobick about Klein's trial strategy. Also Reuther was shown a forged letter from Klein that said Klein was going to give him up for the murder. The letter was forged by Reuther's girlfriend (wife) Marie. The D.A.'s office read the original letter and then read the letter after parts of it were forged to show that Klein was going to give up Reuther.

...

I turned the original over to them myself, at least a week before they showed the damaged copy to Reuther.

...

...from that day on I was an informer. I had no choice; either cooperate or to to jail (p.4)

I used to meet Sgt. Gallagher at a number of different places... His sole interest was to get Klein for the Brandt murder. Anything and everything that Reuther or anyone told me concerning the Brandt murder I was to repeat back to Gallagher. (p.5).

...

After Klein was indicted for the murder I still wore a body recorder and went to see his lawyer Ed Bobick and many other people for the D.A. I went with Ed Bobick when he questioned potential witnesses for Klein... After Bobick spoke to them I reported what they said back to the D.A." (p.5) (Court's Exhibit 2, 1976 hearing).

In this memoranda of his activities as an informant, O'Gorman painted a vivid record of appellant as a man of little honesty. It is a document highly unfavorable to appellant's interests in that it relates various criminal escapades in which he was involved. However, there is no doubt that O'Gorman corroborates Osterman's testimony that O'Gorman took a letter pertaining to appellant's defense. (Ex. 2, p. 18-19). In his memory, however, the letter contained a plan for a concocted defense rather than a true alibi. The strategy of this defense was to blame the crime on Bill Cook. He was eventually a prosecution witness (T.217).

After O'Gorman took the letter, Cook called Osterman and told him that he had seen the letter in Riverhead, which to these men was synonamous with the District Attorney's office (T.277).

At the conclusion of this testimony, Judge Owen clearly did not credit the statements of O'Gorman, except in so far as they related criminal activities on the part appellant (T. J. 20 p.135-6). No suggestion as to O'Gorman's motive to relate true facts detrimental to appellant, but

untrue facts detrimental to the prosecutor, in a document that he kept in his home, was suggested.

The record also contains an affidavit executed by O'Gorman in response to questions asked by Nadjari.(T.J.20p.117).The meeting, to which O'Gorman was brought by two police officers who picked him up at his home in Suffolk County at 5:00 a.m. and brought him, voluntarily and at his request, was held in Manhattan at Nadjari's offices. In his office Nadjari then asked O'Gorman a series of questions about whether the two of them had ever done anything illegel. The answers contradict the statements in the letter.

Nadjari asks about topics that he feels may raise problems when O'Gorman talks to Federal investigators. He then asks leading questions about their joint activity in those areas.

> "Q. Do you know of any impropriety or any criminal activities which occurred during the course of either the trial investigation, the trial preparation, or the trial itself in the trial of Julius Klein?
>
> A. No, I don't
>
> Q. Who were the people in the United States Attorney's Office you have

spoken to about the Klein murder case and the fact that I am their target?

A. Joseph Jaffe who is an United States Attorney, I believe. Carl Bogen who is an investigator. Those are the two that gave me the impression, and I would say that strongly. They almost came out and told me you were the target.

...

Q. Did the United States Attorney's Office question you concerning an appearance you made before Judge Sirignano?

A. Yes, he did.

...

Q. Did you tell Judge Sirignano the truth about what you had known?

A. Yes.

Q. Did anyone force you or coerce you to go there?

A. No.

...

Q. Did I in any way force you to tell that?

A. You didn't know about the story until 3:00 in the morning of the day I went up to the Judge...

...

Q. Did I or any Suffolk Authority ever send you either to Klein's attorney or Klein himself to find out what his defense would be so that I could combat it in Court or rebut it in Court?

A. No, you never did."
(Defendant's Exhibit A, Hearing of 1976).

The 1976 hearing before Judge Owen centered upon the activities of O'Gorman. After it became apparent that O'Gorman would be allowed to remain silent at the 1976 hearing, Judge Owen, on his own motion, requested testimony from Assistant United States Joseph Jaffe. Jaffe had been present at a meeting between O'Gorman, appellant and other federal investigators. (Transcript, July 13, 1976, p. 27, hereinafter cited at T. J. 13, p __). Jaffe testified to the conversation he had with O'Gorman. He related the outlines of the conversation, but had very vague memory of details. He suggested that Investigator Doonan had a different and clearer memory of the conversation (T.J. 13, p. 28). Judge Owen would not let appellant call Doonan. (T.J. 13, p.55).

Appellant had been present at that meeting, but he was not permitted to testify since Judge Owen refused to order his transfer to the court from his place of confinement. The

request that he be allowed to attend the hearing specifically alleged the possibility that he would be needed as a witness (Order for Writ of Habeas Corpus denied, June 29, 1976).

Appellant subpoened George Aspland -- the District Attorney of Suffolk County during 1969 to ascertain whether any material from O'Gorman had been received by his office but Judge Owen instructed him not to appear. (T.J. 20 pp. 131-2)

These rulings brought the hearing to a close. Judge Owen then reaffirmed his earlier ruling denying the writ. He specifically found that O'Gorman, who exercised his privilege not to testify, was not a credible witness. (T.J. 21, p. 139).

Argument

POINT I. THE REFUSAL OF THE DISTRICT COURT TO APPLY THE PER SE RULE TO AN INTENTIONAL INTRUSION IN A PRIVILEGED LAWYER-CLIENT RELATIONSHIP IS ERROR.

The Sixth Amendment created a right to counsel. This right consists of more than simple permission

for an accused to have an advocate accompany him to court. It obviously encompasses notions of adequacy of that representation, while the essence of this right is perhaps the sanctity of the communication between a client and his attorney (Glasser v. United States, 315 U.S. 18 (1967). The constitutionally protected area includes both the direct communications of a client, and the work product -- often referred to as strategy -- of his attorney Coplon v. United States, 191 F.2d 749 (1951) cert. denied 342 U.S. 926 (1952); Caldwell v. United States, 205 F.2d 879 (1953) cert. denied, 349 U.S. 930, reh. denied, 349 U.S. 969 (1955); Hoffa v. United States 385 U.S. 293 (1966).

If the government intrudes upon this sanitized area, the courts will not tolerate the violation of the defendant's rights.

Such governmental conduct as the planting of a paid informer within the team preparing the defense, or the use of a dummy defendant have been described as "intrusion(s) of the grossest kind upon the confidential relationship between the defendant and his counsel." Hoffa v. United States, supra, at p. 306.

Once there has been such gross intrusion, the only

appropriate treatment of the government is to impose a moral as well as legal judgment, and vacate any conviction.

> "When the Government is found guilty of such a charge, the dereliction is more than the bungling of the constable... [i]ts is a corrupting practice which may justify trying one guilty person to indicate the rule of law for all others." (United States v. Rosner 485 F.2d 1213, 1227 [2 Cir., 1973]).

The per se rule is a sensible response to premeditated intentional efforts by a prosecutor to defeat the protection afforded to a defendant by the Sixth Amendment. It is not, however, a necessary result when the intrustion has been justifiable or unintentional. United States v. Gartner, 518 F.2d 633 (2 Cir., 1975); United States v. Arroyo, 494 F.2d 1316 (2 Cir., 1974). When the intrusion is unintentional, then sufficient protection of the defendant's rights may be provided by crafting a remedy dependant upon a showing of prejudice. United States v. Rosner, supra at 1227; United States ex rel Cooper v. Denno, 221 F.2d 626 (2 Cir), cert. denied 349 U.S. 968 (1955).

An examination of these cases reveals that the key factor is distinguishing a gross intrusion, requiring application

of a per se rule, from other intrusions is the intent of the prosecutor in sanctioning the intrusion.

In the United States v. Lusterimo 450 F.2d 572 (2 Cir., 1971) the prosecutor indicted a dummy defendant whom he knew tried with the other defendants. In Coplon v. United States, supra, privileged conversations were intentionally wiretapped. These actions were egregious violations requiring the application of the per se rule. The prosecutor acted intentionally in each case.

In United States v. Arroyo, supra, on the other hand, an informer was mistakenly, not intentionally, indicted. In United States v. Gartner, supra, a conversation was intentionally tapped, but it was not a privileged conversation. Therefore, there was no Sixth Amendment violation to sanction. In United States v. Rosner, supra, co-defendants conferred with Rosner while considering whether to cooperate, and at not time were willing to give any information about Rosner. The co-defendants were thus not "planted" (United States v. Rosner, supra, at p. 1227), by the Government, and the prosecutor committed no intentional act causing a known informant to interact with the defense team.

In the cases in which the per se rule has been rejected, no intentional, unjustified conduct existed. In the per se cases, the intrusive conduct was intentional.

The courts have often spoken of a moral basis for the per se rule. However, the focus upon an intentional intrusive act by a prosecutor -- the key note of a per se violation--suggest a more practical basis. A prosecutor who intentionally violates a defendant's Sixth Amendment right has potentially committed a crime. See: e.g., 18 U.S.C. § 241 (Conspiracy Against Rights of Citizens).

If the per se rule is rejected, then defendant will be forced to prove not only the fact of intrusion, but that information was transmitted, and that said information prejudiced him. United States v. Mosca, 475 F.2d 1052 (2 Cir., 1973). Such proof necessarily involves testimony by either the informer or the prosecutor. Without their admission that information was transmitted, and without their specification of the substance thereof, no proof of prejudice is possible.

But when the intrusion is the product of the joint intent of prosecutor and informant, it is a crime. Use of the per se rule in this situation sensibly protects defendants

from mounting the obviously futile task of gaining admissions of criminal conduct from the authors of the crime. Since men corrupt enough to willingly implant spies in a flagrant violation of the rights of the accused cannot be expected to readily expose themselves to criminal liability by confessing, the defendant intentionally abused would have no realistic recourse through the law without the per se rule. It is the protection of the defendant against being twice victimized by the same men. Once it is shown that an intentional intrusion was authorized, no sensible rule could impose a requirement of proving prejudice. Such a requirement would defeat the ends of justice. The per se rule is thus both a moral judgment and a practical resolution of this dilemma.

Appellant herein has shown that the prosecutor, Maurice Nadjari, and those working with him on appellant's case, permitted two men to confer on a regular basis with appellant's attorneys and th prosecution staff.

The paid informant, William O'Gorman not only met with appellant's attorneys, but it was proven that he even gave information to the prosecutor about conversations

that this attorney had with a client. No actions were taken by the prosecution team to curtail his penetration of the defense. He was never told to keep silent about the lawyers' activities. In United States v. Arroyo, supra, on the other hand, the prosecutor clearly and unequivocally instructed and prevented his informant from obtaining or disseminating privileged information.

The impracticality of any rule but the per se rule in a case revealing such an intentional intrusion is amply demonstrated by O'Gorman's refusal to testify based upon a claim of Fifth Amendment privilege. His claim was that he would have to admit crimes committed during his activities for the prosecutor. He also claimed through counsel that these activities continued until the date of the habeas hearing. (T.J. 18, p.20 et seq.). Declarations against interest written by O'Gorman revealed that his role as spy upon appellant included stealing a defense document and giving it to the prosecutor, and taping conversations between the defense attorney and witnesses for the prosecutor (Court's Exhibit 2). The theft of the letter was corroborated by the testimony of Owen Osterman. His meetings with the attorneys are nowhere denied. The fact

that he worked on appellant's case for Gallagher was corroborated by Gallagher.

No interpretation of this record can deny the fact that the prosecution team knew that O'Gorman met with attorney Bobick while Bobick acted in his representative capacity. No interpretation of this record can deny the fact that information about such representational activities was transmitted. This proof by itself substantiates the claim of intentional intrusion. The application of the per se rule must follow.

Rejection of the per se rule results in a hearing at which those responsible for the intrusion of O'Gorman can attempt to avoid sanction by the court through the ploy of denying that the recognized "plant" transmitted information about this case. While such testimony is being offered in court, out of court, the very prosecutor in charge of this case meets with the informant and asks him a series of leading questions. The substance of these questions can be condensed to the following: "You and I didn't do anything wrong? Did we?"

The per se rule prevents such debasement of the

process of justice. Once intentional intrusion has been shown, the court must prevent clever litigants from crassly abusing the reasonable rules created to balance fundamental rights. Self-serving affidavits introduced into evidence through government informants who hide the details of their conduct behind the privilege against self-incrimination cannot be the substance of the judicial process.

But appellant need not rely upon proof of this single intentional intrusion. His conviction was abetted by the use of two different informers.

The other prosecution man in the defense camp was the co-defendant, William Reuther. He was represented by the same attorney as appellant. This representation was abetted by the prosecutor. In fact, the prosecutor knew of the joint representation from the day of appellant's indictment. He did nothing thereafter to prevent communication between Reuther and appellant's attorneys, nor to restict Reuther's discussion with other members of the prosecution staff.

The pre-indictment cooperation of Reuther distinguishes this case from United States v. Mosca, supra in

which cooperation did not start until four months after the indictment. This difference is one of substance because of the finding in Mosca that the only important contact between defendants after cooperation started was at two pre-trial conferences (United States v. Mosca, supra, p. 1060). The greatest distinction, of course, is that Reuther and appellant had the same attorney!

Intentionally creating such a situation -- a situation which comes perilously close to that of the sham defendants in United States v. Lusterimo, supra -- lead to incredible testimony. The duality of representation meant that there were many important contacts (within the meaning of Mosca). But since the District Court rejected the per se rule, despite the gross excess herein, compared to Mosca, the cooperating Reuther was permitted to testify that over a seven month period he never once talked to his attorneys about the details of his defense. The talewould be incredible if Reuther were not cooperating. It is worse since he was. To reasonably conceal his cooperation he would have had to demonstrate some interest in this serious case. An attorney does not travel 100 miles to

see a client and say, "Don't worry."

Once again the trial court's rejection of the per se rule in a situation in which there has been an intentional intrusion created the potential for abuse of the system.

It must be noted that in this case, as distinguished from United States v. Arroyo, supra, the alleged fear of the informer was not credible since both he and appellant were in custody, and separated by hundreds of miles.

The Distict Court's finding rests exclusively on the issue of prejudice.

> "I conclude that there is absolutely no showing of actual prejudice to the relationship between the petitioner and his attorneys." (Memorandum and Order, Judge Owen, October 15, 1974, p. 4)

In fact, Judge Owen viewed the evidentiary hearing as nothing but an attempt to prove prejudice.

> "I held a four-day evidentiary hearing to determine whether Reuther had in fact disclosed any confidential

defense plans of strategy..."
(Memorandum and Order,
October 15, 1974, p.3)

The per se rule was therefore rejected as a matter of law. No find that the intrusion was unintentional, was, or could be made.

The per se rule must be applied in this case because an intentional and therefore gross intrusion upon the appellant's Sixth Amendment rights has been proven. The District Court was wrong in rejecting that rule, and the writ must be granted and a new trial ordered.

POINT II IN PERMITTING A WITNESS TO REFUSE TO TESTIFY THE DISTRICT COURT COMMITTED ERROR.

The testimonial privilege created by the Fifth Amendment does not permit a witness to withhold all testimony. The privilege may be properly invoked only when, "...the witness has reasonable cause to apprehend danger from a direct answer." Mason v. United States 244 U.S. 362, 365 (1917).

It is the obligation of the District Court to

determine whether a question raises an area in which a witness may directly, or indirectly incriminate himself.

> "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself--his say-so does not of itself establish the hazard of incrimination. It is for the Court to say whether his silence is justified." United States v. Llanes, 398 F.2d 880, 885 (2 Cir., 1968)

In making this judgment, the trial judge, "...must be governed as much by his personal perception of the pecularities of the case as by the facts actually in evidence." Llanes, supra at p. 885.

The essence of the right is that the testimony elicited will not directly, or indirectly, be used to further a criminal action against the witness. Since the Supreme Court's decisions in Murphy v. Waterfront Commission, 378 U.S. 52 (1964); Kastigar v. United States, 406 U.S. 441 (1971); and Zicarelli v. Investigation Commission, 406 U.S. 472 (1972), total immunization from criminal prosecution is not constitutionally compelled. Only the testimony is protected.

Thus, the claim of privilege may not be sustained by the District Court when it is,

> "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken and that the answer[s] cannot possibly have such tendency" to incriminate. Hoffman v. United States, 341 U.S. 479, 488 (1951).

The Hoffman case is illustrative of the type of situation in which the privilege may properly be exercised. Hoffman was subject to indictment by the very grand jury before which he was to testify. He had a long police record and could well have been involved in the activities about which he was being asked.

Similarly, in United States v. Miranti 253 P.2d 135 (2 Cir., 1958), Miranti was subject to indictment by the very grand jury before whom he was to testify because the subject matter of his testimony was an incriminating prior statement.

In United States v. Chandler, 380 F.2d 993 (2 Cir., 1967), Chandler was clearly liable for his concealment of evidence of the commission of a crime -- a torn draft card.

In each of these cases, the Court was able to find from the basic facts of the case (e.g.: the prior statement in Miranti, the torn card in Chandler) that the information solicited in response to questions could "possibly" incriminate the witness. From the manner in which the Court, in these cases, reviewed the facts already known to the Court, to find a realistic possibility of incrimination, it is clear that the test defined by the word "possible" does not include speculatively. But, only through speculation can it be found that the witness, William O'Gorman, herein, could incriminate himself. Any crime he may have committed in cooperating with the prosecutor is no longer the basis for a criminal prosecution because of the bar of the statute of limitations. In both federal and state jurisdictions the limitation period is five years -- 18 U.S.C. § 3282, 11A McKinneys Criminal Procedure Law § 30.10(2)(b). The extension of the limitation period for public officials, of course, cannot apply to a simple informant. No criminal liability is possible.

In granting the privilege, the District Court relied upon Manes v. Myers, 42 L Ed 2d 574 (1975.). In that case, the Supreme Court approved reliance upon the Fifth

Amendment when the information to be illicited

> "would furnish a link in the chain of evidence that could lead to prosecution..." Manes v. Myers at p.585.

But the "link in the chain" theory of Manes does not extend the scope of the protection as established in Hoffman. The facts in Manes amply reveal that incrimination was not a speculation but a possibility. The witness was in possession of magazines of an explicity sexual nature which would probably be the subject of subsequent criminal proceedings Manes v. Myers, supra, p.589.

The unsupported allegations of O'Gorman's counsel, that activities against appellant may have continued beyond 1969, is not sufficient to create a possibility of incrimination. In each case in which the privilege has been authorized, the known facts support a finding of possible incrimination based upon a rational analysis.

The grant of privilege is unsupportable. It lacks reason and equity. By granting O'Gorman the privilege to remain silent, the District Court prevents appellant

from ascertaining the truth.

The case must be remanded so that the testimony of Mr. O'Gorman can be taken.

POINT III THE DISTRICT COURT IMPROPERLY PRECLUDED APPELLANT FROM CALLING WITNESSES WHO HAD RELEVANT TESTIMONY.

It is clear that the District Court does not have to grant an evidentiary hearing. But once a hearing has been granted, and sworn testimony taken, the curtailment of that hearing is as significant a restriction upon appellant's right to vindicate his constitutional rights as would be the denial of a hearing when one was required or the refusal to ensure representation by counsel. Hudson v. Hardy 412 F.2d 1091 (DC Cir., 1968); United States ex rel Wissenfeld v. Williams 281 F.2d 707 (2 Cir., 1960).

The matter must be remanded so that a full hearing can prove the facts of the constitutional violations alleged in the petition.

POINT IV THE DISTRICT COURT WAS WRONG TO DENY APPELLANT'S MOTION TO BE BROUGHT TO BE BROUGHT TO COURT TO PARTICIPATE IN THE HEARING.

Prior to the 1976 hearing, appellant requested that the District Court sign a writ transferring him to the Southern District of New York so that he could participate in the factual hearing. After Mr. O'Gorman was permitted to assert his Fifth Amendment privilege and the District Court called a witness who would testify about a conversation in which appellant participate, the application for a writ was renewed Both applications were denied.

A habeas corpus hearing involves the resolution of factual issues in which appellant can provide knowledge and assistance to his attorney. If the hearing is to involve the taking of testimony, the appellant has a right to be present. United States v. Fitzpatrick 378 F.2d 85, 87 (2 Cir., 1967). That right is a practical necessity when the witness is testifying to an event in which appellant participated. cf. United States ex rel Griffin v. McMann, 310 F. S. 72 (SDNY, 1970).

The impact of appellant's absence was significant herein, because a witness, Joseph Jaffe contradicted, implicitly, some allegations made by appellant in an affidavit (T.J. 13, p.33). Without the ability to consult with appellant, counsel was seriously impaired in his ability to cross-examine this court called witness.

> "Where as here there are substantial issues of fact as to events in which the prisoner participated, the trial judge should require his production for a hearing." United States v. Hayman, 342 U.S. 205, 223 (1951).

The matter must be remanded so that the hearing can resume with appellant present.

CONCLUSION

THE ORDER OF THE DISTRICT COURT DENYING THE WRIT SHOULD BE REVERSED, THE WRIT SHOULD BE GRANTED AND A NEW TRIAL ORDERED.

Dated: Hempstead, New York
October 28, 1976

Respectfully submitted,

LAWRENCE W. KESSLER
Attorney for Appellant